

## EU Action Plan against Wildlife Trafficking – Recent Belgian Criminal Cases

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### Abstract

The article introduces international, European and Belgian legislation on trade in endangered species of wild animals and plants and discusses the EU Action Plan against Wildlife Trafficking. Notably, this contribution provides empirical insights in the functioning of the Belgian system for enforcement of wildlife trafficking regulations and provides a first set of empirical data on the effectiveness of criminal charges in this field of EU environmental law. To this extent, the four reviewed Belgian judgments are examples of effective criminal sanctioning of wildlife crime. They also show that wildlife crime is hot and organised, and that Belgium is both a final destination market for live birds and reptiles and a transit point for trafficking of ivory and sea horses to other continents, such as Asia.

To meet the targets of the EU Action Plan against Wildlife Trafficking, the fight against wild life trafficking should be stepped up. As regards Belgium, this manuscript highlights that the federal state and the three regions should better coordinate their CITES policy and legislation. In view of the increase of CITES-cases, the training and capacity of the inspection, customs and police services should be strengthened further. More frequent controls at the airports and ports would increase the chance of being caught. The environmental unit of the federal police should be reinforced. Moreover, a federal CITES public prosecutor could be appointed for serious CITES cases in which there are links with terrorism and organised crime. More research

capacity and international cooperation would allow to tackle not only the couriers, but the principals and addressees in the countries of origin and destination. Finally, the assignment of CITES cases to specialised sections of the courts would contribute to more efficiency and better continuity in the interpretation and enforcement of CITES regulations.

## Keywords

wildlife trafficking – CITES – EU Action Plan – Belgian enforcement regime – standing of ENGOS – bird laundering – smuggling of sea horses – ivory – Greek tortoises – criminal sanctions – preliminary conclusion and recommendations

## 1 Introduction

The title of this article may raise questions. What is Belgian case law on wildlife trafficking about? Which species are concerned and where do these come from? Is there any wildlife to trade at all in tiny and industrialized Belgium? In what way is this relevant to Asia?

Wildlife trafficking is an organised crime with estimated worldwide profits between \$8 and \$20 billion annually, globally third only behind narcotics and illegal arms trade.<sup>1</sup> Wildlife trafficking threatens the survival of some of Earth's most iconic species, such as the white rhinoceros. It has devastating effects on local economies and undermines the rule of law. It plays a role in financing the operations of armed militias and terrorist networks.

Despite its societal relevance, a close search for legal literature on the EU legal framework tackling wildlife trafficking in the last five years, reveals that this field of EU environmental law is under researched. Except from Kouvaras's work<sup>2</sup> providing a general overview on how to enforce EU Legislation on biodiversity and wildlife trafficking and studies focusing on criminal law in general,<sup>3</sup>

1 [http://ec.europa.eu/environment/cites/infographics\\_en.htm](http://ec.europa.eu/environment/cites/infographics_en.htm).

2 I. Kouvaras, 'EU Confronting Wildlife Trafficking', *EEELR* 2016/25 (3) 76–86. See also, P.H. Sand, 'Enforcing CITES: The rise and fall of trade sanctions.' *RECIEL* 2013/22 (3) 251–263, focusing on international law, rather than EU law.

3 For example, most recently, J. Zicha, 'Evaluation of Implementation of the Environmental Crime Directive in Relation to Wildlife Crime', *The Lawyer Quarterly*, 2019/9 (3) 213–227; and L. Elliott, 'Cooperation on Transnational Environmental Crime: Institutional Complexity Matters', *RECIEL* 2017/26 (2) 107–117. For a more general focus see L. Kramer, 'EU Negotiating and Voting under the Amended CITES Convention', *JEEPL* 2015/12 (1) 3–21.

most data come from official reports,<sup>4</sup> case law collections,<sup>5</sup> or different scientific disciplines,<sup>6</sup> or non-EU jurisdictions.<sup>7</sup> Also in light of the EU Action Plan against Wildlife Trafficking of 2016,<sup>8</sup> this paper aims at shading lights on wildlife trafficking from a legal perspective, by focusing on Belgium. By answering the research questions posed at the opening of the manuscript, this article will provide an initial set of empirical data and legal considerations, which will stimulate comparative research from other countries.

To answer the research questions posed in this article, this article will first introduce international, European and Belgian legislation on trade in endangered species of wild animals and plants, and discuss the EU Action Plan against Wildlife Trafficking (section 2). As Environmental Non-Governmental Organizations (ENGOS) play an important role in the enforcement of the CITES regime,<sup>9</sup> in section 3, the article will explain to what extent ENGOS have standing in Belgium in wildlife trafficking cases. Further on, we will discuss four recent criminal judgments in wildlife trafficking cases (section 4). In light of these cases, some preliminary findings are proposed and used to formulate recommendations for policy makers in Belgium, which are useful for comparative research focusing on other jurisdictions (section 5).

## 2 Belgian Law on Wildlife Trafficking

### 2.1 *Belgium as a Party to the CITES Convention*

International wildlife trade is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES Convention”).<sup>10</sup>

4 A list of which can be found on the European Commission website, [https://ec.europa.eu/environment/cites/trafficking\\_en.htm](https://ec.europa.eu/environment/cites/trafficking_en.htm) (accessed December 2019).

5 Such as those in this journal, e.g. L. Squintani, ‘Case Law of the Court of Justice of the European Union and the General Court: Reported Period 15.7.–15.12.2014’, *JEEPL* 2015/12 (1) 57–69.

6 E.g. from a criminological perspective, R.A. Sollund, ‘The Illegal Wildlife Trade from a Norwegian Outlook: Tendencies in Practices and Law Enforcement’, in R.A. Sollund (eds), *Green Harms and Crimes. Critical Criminological Perspectives*, Palgrave Macmillan, London, 2015; and S.F. Pires & W. Moreto, *The Illegal Wildlife trade*, Oxford Handbooks Online, OUP 2016, 1–41, both with further references.

7 E.g. G. Broussard, ‘Building an Effective Criminal Justice Response to Wildlife Trafficking: Experiences from the ASEAN Region’, *RECIEL* 2017/26 (2) 118–127.

8 Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions, EU Action Plan against Wildlife Trafficking, COM/2016/087 final.

9 S. Guggisberg, ‘The roles of nongovernmental actors in improving compliance with fisheries regulations’, *RECIEL* 2019/28 (3) 314–327.

10 *UNTS* 993, 243.

Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.<sup>11</sup>

Because the trade in wild animals and plants crosses borders between countries, the effort to regulate it requires international cooperation to safeguard certain species from overexploitation. The CITES Convention was conceived in the spirit of such cooperation. It accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs.

The text of the Convention was agreed in Washington on 3 March 1973, and on 1 July 1975 it entered into force.<sup>12</sup>

Belgium ratified the CITES Convention on 3 October 1983, and it entered into force on 1 January 1984.<sup>13</sup> The European Union acceded to the CITES Convention on 9 April 2015, and it entered into force on 8 July 2015.<sup>14</sup>

The CITES Convention provides a framework. It is an agreement between governments. Each Party must adopt national laws to ensure that the CITES Convention is implemented at the national level.

11 According to the treaty website, <https://www.cites.org>, annually, international wildlife trade is estimated to be worth billions of dollars and to include hundreds of millions of plant and animal specimens. The trade is diverse, ranging from live animals and plants to a vast array of wildlife products derived from them, including food products, exotic leather goods, wooden musical instruments, timber, tourist curios and medicines. Levels of exploitation of some animal and plant species are high and the trade in them, together with other factors, such as habitat loss, is capable of heavily depleting their populations and even bringing some species close to extinction (e.g. the white rhinoceros). Many wildlife species in trade are not endangered, but the existence of an agreement to ensure the sustainability of the trade is important in order to safeguard these resources for the future.

12 The authentic text versions are in English, French, Spanish, Russian, and Chinese: [https://www.cites.org/sites/default/files/common/docs/CN-Text\\_Convention.pdf](https://www.cites.org/sites/default/files/common/docs/CN-Text_Convention.pdf).

13 Belgium joined the Convention by making a formal declaration in writing to the Depositary Government, this is the Government of Switzerland. The Convention enters into force 90 days later. The ratification was published in the Belgian State Gazette of 30 December 1983, p. 16578.

For further information in this regard, see <https://www.cites.org/eng/disc/parties/index.php> (consulted on 22 January 2020).

14 The basis for the EU accession to CITES is Council Decision (EU) 2015/451, which was adopted on 6 March 2015 and published in the Official Journal L 75 of 19 March 2015. The initial text of the CITES Convention signed in 1973 foresaw that only States could be Parties to it. This has changed with the entry into force of an amendment in November 2013 which allows regional economic integration organisations to join CITES. On that basis, the Council approved on 6 March 2015 the EU accession to CITES, after the European Parliament gave its consent on 16 December 2014. For further information on representation of the EU at CITES Conferences Of the Parties, see [https://ec.europa.eu/environment/cites/gaborone\\_en.htm](https://ec.europa.eu/environment/cites/gaborone_en.htm) (consulted on 22 January 2020).

It applies to trade, which the CITES Convention defines as “*export, re-export, import and introduction from the sea*”.<sup>15</sup> “Re-export” means export of any specimen that has previously been imported.<sup>16</sup> “Introduction from the sea” means transportation into a State of specimens of any species, which were taken in the marine environment not under the jurisdiction of any State.<sup>17</sup>

More in particular it applies to trade of wildlife species. To this extent, the CITES Convention defines “species” as “*any species, subspecies, or geographically separate population thereof*”, and “specimen” as “*any animal or plant, whether alive or dead or any readily recognizable part or derivative thereof*”.<sup>18</sup> Besides, the species covered by the CITES Convention are listed in three Appendices, according to the degree of protection they need.

Appendix I lists species that are the most endangered among CITES-listed animals and plants.<sup>19</sup> They are threatened with extinction and the CITES Convention prohibits international trade in specimens of these species except when the purpose of the import is not commercial,<sup>20</sup> for instance for scientific research. In these exceptional cases, trade may take place provided it is authorised by the granting of both an import permit and an export permit (or re-export certificate). Article VII of the Convention provides for a number of exemptions to this general prohibition (e.g. for specimens of animal species included in Appendix I, who were bred in captivity for commercial purposes).

Appendix II lists species that are not necessarily threatened with extinction now, but that may become so unless trade is closely controlled. It also includes so-called “look-alike species”, i.e. species whose specimens in trade look like those of species listed for conservation reasons.<sup>21</sup> International trade in specimens of Appendix II species may be authorized by the granting of an export permit or re-export certificate. No import permit is necessary for these species under the CITES Convention (although a permit is needed in some countries that have taken stricter measures than CITES requires). Permits or certificates should only be granted if the relevant authorities are satisfied that certain conditions are met, above all that trade will not be detrimental to the survival of the species in the wild.<sup>22</sup>

15 Article I, c of the CITES Convention.

16 Article I, d of the CITES Convention.

17 Article I, e of the CITES Convention.

18 Article I, a and b of the CITES Convention.

19 Article II, paragraph 1 of the CITES Convention.

20 Article III of the CITES Convention.

21 Article II, paragraph 2 of the CITES Convention.

22 Article IV of the CITES Convention.

Appendix III contains a list of species included at the request of a Party that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation.<sup>23</sup> International trade in specimens of species listed in this Appendix is allowed only on presentation of the appropriate permits or certificates.<sup>24</sup>

The Conference of the Parties (CoP), which is the supreme decision-making body of the Convention, has agreed in a Resolution Conf. 9.24 on a set of biological and trade criteria to help determine whether a species should be included in Appendices I or II.<sup>25</sup> At each regular meeting of the CoP, Parties submit proposals based on those criteria to amend these two Appendices. Those amendment proposals are discussed and then submitted to a vote.

At the 18th meeting of the CoP, held in Geneva, Switzerland, from 17 to 28 August 2019, certain amendments were made to the Appendices to the Convention. Some new species were included in Appendices I, II and III to the Convention. Other species were transferred from Appendix II to I or vice versa.<sup>26</sup>

## 2.2 *EU CITES Regulations Are Directly Applicable*

Due to the European Single Market and the absence of systematic border controls within the European Union, the provisions of the CITES Convention have to be implemented uniformly in all EU Member States. The CITES Convention has been transposed and rendered more stringent in the European Union by Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora, replaced by Regulation Nr. 338/97 ("EU CITES Regulation")<sup>27</sup> and a series of executive regulations.<sup>28</sup>

23 Article II, paragraph 3 of the CITES Convention.

24 Article V of the CITES Convention.

25 Conf. 9.24 (Rev. CoP17), available at <https://www.cites.org/eng/res/09/09-24r16.php> (consulted on 20 February 2020).

26 <https://cites.org/eng/cop/18/prop/index.php> (consulted on 22 February 2020); implemented through Commission regulation (EU) 2019/2117 of 29 November 2019 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, *OJ L 320/13*, replaces the annex to the EU CITES Regulation No 338/97 with a new annex.

27 Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, *OJ L 61, 3.3.1997, pp. 1–69* ("EU CITES Regulation"), updated many times.

28 Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, *OJ L 166, 19.6.2006, pp. 1–69* ("Implementing Regulation"); Commission Implementing Regulation (EU) No 792/2012

These regulations are directly applicable in the EU Member States and must be applied in addition to the national laws. However, to be effective in practice, EU regulations often require national implementing measures, such as sanctioning provisions.<sup>29</sup>

According, to the Court of Justice of the European Union, the CITES Convention and the CITES Regulation only establish a minimum level of protection allowing its party members to go beyond such minimum level,<sup>30</sup> as regards several key aspects.

First of all, the EU regulations are stricter than the CITES Convention because they have included certain non-CITES species and prohibit the import of certain species into the European Union because they are considered a threat to the European native fauna and flora. The EU CITES Regulation covers species listed in four annexes: A, B, C and D. Annex A includes all CITES Appendix I species, except where EU Member States have entered a reservation, some CITES Appendix II<sup>31</sup> and III species, for which the EU has adopted stricter domestic measures, and some non-CITES species.<sup>32</sup> Annex B includes all other CITES Appendix II species, except where EU Member States have entered a reservation, some CITES Appendix III species, and some non-CITES species.<sup>33</sup>

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of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein and amending Commission Regulation (EC) No 865/2006, *OJ L 242*, 7.9.2012, pp. 13–45 (“Permit Regulation”); Commission Implementing Regulation (EU) 2017/1915 of 19 October 2017 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora, *C/2017/6968 OJ L 271*, 20.10.2017, pp. 7–24.

29 C.M. BILLIET and R. MEEUS, “Europese verordeningen als wetgevingsvraagstuk: het voorbeeld van de milieuverordeningen”, *TVW* 2009, 278–306, nrs. 7–9.

30 For the CITES Convention see, Case C-510/99 *Tridon* [2001] EC I-7777; for the CITES Regulation see Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers* [2008] ECR I-4475. The reasoning in the *Nationale Raad van Dierenkwekers en Liefhebbers* case was confirmed in Case C-100/08, *Commission v Belgium* [2009] ECR I-140 summary publication, para. 67 of the Dutch version of this judgment, which is available in full only in Dutch and French and on [www.curia.eu](http://www.curia.eu), discussed in L. Squintani, *Gold-Plating of European Environmental Law*, Ph.D. Dissertation, University of Groningen, 2013, in particular, 9–27; and L. Squintani, *Beyond Minimum Harmonisation*, CUP 2019, chapter 1.

31 For example, the Black Stork (*Ciconia nigra*) occurs in the wild in Belgium and in the EU. It is listed in Annex A of the EU CITES Regulation, and in Appendix II of the CITES Convention. The listing of species can easily be found on <https://www.speciesplus.net>.

32 For example, the Great Egret (*Ardea alba*) is native to the EU. It is listed in Annex A of the EU CITES Regulation, but not in the Appendices to the CITES Convention.

33 For example, the Esperanza or Oaxacan Swallowtail (*Papilio esperanza*), endemic to Mexico and threatened by poaching, is listed in Annex B of the EU CITES Regulation, but not in the appendices to the CITES Convention.



Annex C includes all other CITES Appendix III species, except where EU Member States have entered a reservation. Annex D includes some CITES Appendix III species for which the EU holds a reservation, and some non-CITES species in order to be consistent with other EU regulations on the protection of native species, such as the Habitats Directive<sup>34</sup> and the Birds Directive.<sup>35</sup>

Furthermore, the definition of “trade” in the EU CITES Regulation is broader than the definition in the CITES Convention. It also aims at the use, movement and transfer of possession of specimens within the Community or within a Member State.<sup>36</sup>

Finally, the EU definition of “specimen” is more comprehensive than the international one:

*any animal or plant, whether alive or dead, of the species listed in Annexes A to D, any part or derivative thereof, whether or not contained in other goods, as well as any other goods which appear from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be or to contain parts or derivatives of animals or plants of those species, unless such parts or derivatives are specifically exempted from the provisions of this Regulation or from the provisions relating to the Annex in which the species concerned is listed by means of an indication to that effect in the Annexes concerned.*<sup>37</sup>

### 2.3 EU Action Plan against Wildlife Trafficking

In February 2016, the European Commission adopted a Communication on the EU Action Plan against Wildlife Trafficking,<sup>38</sup> which aims at addressing wildlife

34 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ L* 206, 22.7.1992, pp. 7–50.

35 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, *OJ L* 20, 26.1.2010, pp. 7–25.

36 Article 2, u) EU CITES Regulation defines “trade” as follows: “the introduction into the Community, including introduction from the sea, and the export and re-export therefrom, as well as the use, movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions of this Regulation”. According to article 2, v) EU CITES Regulation: “transit” means “the transport of specimens between two points outside the Community through the territory of the Community which are shipped to a named consignee and during which any interruption in the movement arises only from the arrangements necessitated by this form of traffic”.

37 Article 2, t) EU CITES Regulation.

38 Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions EU Action Plan against Wildlife Trafficking, COM/2016/087 final.



trafficking within the European Union and strengthening the EU's role in the global fight against these illegal activities. The plan<sup>39</sup> has three priorities:

- more effective prevention: reduce the demand and supply of illegal wildlife products (e.g. ivory);
- combating wildlife crime more effectively: better enforcement of wildlife trafficking rules and increasing the capacity of the enforcement chain;
- enhanced cooperation between source, consumer and transit countries (e.g. more EU funds to developing countries).

The Action Plan runs until 2020 and is being implemented jointly by the EU and its Member States.

In June 2016, the EU Members States' environment ministers adopted Council conclusions<sup>40</sup> on the EU Action Plan against Wildlife Trafficking endorsing the three priorities of the plan and calling for timely implementation of the relevant actions by the Commission, the High Representative, Europol, Eurojust, and the Member States. Moreover, the European Parliament adopted a resolution<sup>41</sup> on the EU Action Plan on 24 November 2016.

In 2018, the European Commission published a progress report<sup>42</sup> that underlined that efforts have to be intensified to reach the objectives of the Action Plan by 2020 and meet the targets of the UN 2030 Agenda for Sustainable Development on wildlife trafficking.

The report is accompanied by a document containing an overview of measures taken to achieve the objectives of the Action Plan. The individual EU countries' contributions to the progress report are available online.<sup>43</sup>

Progress made during the remaining years and the overall success of the EU Action Plan in curbing wildlife trafficking will be evaluated in 2020.

## 2.4 *Belgian Implementation of the CITES Regime: a Mixed Competence of the Federal State and the Regions*

### 2.4.1 Powers and Organisation of Enforcement Authorities

Belgium is a federal state consisting of 3 communities and 3 regions.<sup>44</sup> The federal CITES Act of 28 July 1981 implements the CITES Convention at the

39 [http://ec.europa.eu/environment/cites/pdf/WAP\\_EN\\_WEB.PDF](http://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF).

40 <http://data.consilium.europa.eu/doc/document/ST-10512-2016-INIT/en/pdf>.

41 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0454+0+DOC+XML+Vo//EN>.

42 [http://ec.europa.eu/environment/cites/pdf/progress\\_report\\_EU\\_action\\_plan\\_wildlife\\_trafficking\\_en.pdf](http://ec.europa.eu/environment/cites/pdf/progress_report_EU_action_plan_wildlife_trafficking_en.pdf).

43 [https://ec.europa.eu/environment/cites/trafficking\\_en.htm](https://ec.europa.eu/environment/cites/trafficking_en.htm).

44 Belgium evolved from a unitary state to a federal state consisting of 3 communities (the Flemish Community, the French-speaking Community and the German-speaking

national level.<sup>45</sup> The CITES Act is further implemented by the Royal Decree of 9 April 2003 on the protection of species of wild flora and fauna by controlling their trade.<sup>46</sup>

The regions are competent for nature conservation, but the “import, export, and transit of *exotic* plant and animal species” is a federal competency. This means the federal state is competent for import, export and transit of exotic CITES-species. The regions are competent for import, export and transit of *native* CITES-species, i.e. who occur in the wild in Belgium (e.g. the Common Buzzard (*Buteo buteo*) or the Common Crane (*Grus Grus*), listed in Appendix II of the CITES Convention and in Annex A of the EU CITES Regulation). In addition, the regions are competent for any other protective measures not related

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Community), 3 regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region), 10 provinces and 589 municipalities. Belgium (only) has a surface area of 30,528 km<sup>2</sup> and a population of 11,358,357. Of this number, 6,516,011 live in the Flemish Region within an area of 13,522 km<sup>2</sup>. 3,585,214 people live in the Walloon Region within an area of 16,844 km<sup>2</sup> and 1,198,726 people in the Brussels-Capital Region within an area of 161 km<sup>2</sup>.

Both the federal state and the constituent states have their own parliamentary assembly and their own government. The federal parliament passes “laws”, the regional parliaments pass “decrees” or “ordinances” (Brussels-Capital Region). The communities were set up in order to protect the cultural identity of the Dutch-speaking, French-speaking and German-speaking populations of Belgium. The regions were set up mainly to regulate economic and local matters. The regions have important powers in environmental matters. The regions have competencies in town and country planning, environmental protection with respect to soil, water, air and noise, environmental permits, waste management, water management, land use, nature conservation, agriculture, scientific research, and European and international environmental policy with respect to their competencies. The federal government remains responsible for protection against ionising radiation and radioactive waste, the establishment of product standards, the protection of the North Sea, CITES (except with respect to native species of plants and animals), input to European environmental policy, and the conclusion of treaties with respect to its competencies.

45 “Wet van 28 juli 1981 houdende goedkeuring van de Overeenkomst inzake de internationale handel in bedreigde in het wild levende dier- en plantensoorten, en van de Bijlagen, opge maakt te Washington op 3 maart 1973, alsmede van de Wijziging van de Overeenkomst, aangenomen te Bonn op 22 juni 1979”. The CITES-Act was published in the Belgian State Gazette on 30 December 1983 and entered into force on 10 January 1984.

46 “Koninklijk besluit inzake de bescherming van in het wild levende dier- en plantensoorten door controle op het desbetreffende handelsverkeer”, Belgian State Gazette of 6 June 2003. Initially the CITES-Act was implemented by a Royal Decree of 20 December 1983, “Koninklijk besluit van 20 december 1983 houdende toepassing van de Overeenkomst inzake de internationale handel in bedreigde in het wild levende dier- en plantensoorten”, Belgian State Gazette of 30 December 1983.

to import, export or transit of CITES-species located in their territory, such as their possession and trade, whether these are native or exotic CITES-species.<sup>47</sup>

These powers are intricately intertwined. The division of powers as regards CITES is complex, even for professionals. Therefore, we fully agree with those Belgian legal scholars that advocate for the conclusion of a cooperation agreement by the federal state and the three regions to better coordinate policy and legislation regarding CITES.<sup>48</sup>

As regards the organisation of *justice, customs and the police* forces, in Belgium, these are a federal competency, also in the context of the CITES framework. Indeed, a federal CITES management authority has been established as part of the Federal Public Service for Public Health, Safety of the Food Chain and the Environment.

However, article 7, §1 of the CITES Act entrusts the investigation of CITES offences to six different Belgian federal as well as regional inspection services and federal or local police services:

- CITES inspectors of the Federal Public Service for Public Health, Safety of the Food Chain and the Environment; other personnel of this Federal Public Service;
- customs officers;
- the federal police;
- the local police;
- inspectors from the Flemish Region, the Brussels Capital Region or the Walloon region; and
- inspectors of the Federal Agency for the Security of the Food Chain.

In case of offences of the CITES Act, the executive decrees or the EU CITES Regulation, these inspectors or police officers must send the official report of the offences to the Prosecutor and send a copy to the CITES inspectors of the Federal Public Service for Public Health, Safety of the Food Chain and the Environment. The Prosecutor has 90 days to decide to inform the CITES inspector whether the case will be criminally prosecuted. If not, or if the Prosecutor does not answer within 90 days, the CITES inspector can impose an administrative fine.<sup>49</sup>

47 C. BILLIET, “Sierra Leone – Beijing met gedroogde zeepaardjes: vijftien maanden cel”, *TMR* 2017/5, p. 553, n°15.

48 C. BILLIET, Sierra Leone, p. 553, n°17. The conclusion of a “cooperation agreement” is possible in Belgium under art. 92bis, §1 of the Special Law for the Reform of the Institutions of 8 August 1980, “*Bijzondere Wet tot Hervorming der Instellingen*”, Belgian State Gazette of 15 August 1980.

49 Articles 5bis and 7, §4 CITES Act. The Flemish regional inspection service (“Departement Omgeving, Afdeling Handhaving”) applies, however, a different procedure. This is

The fight against illegal trade in endangered species is described as a priority in the Framework Note on Integral Safety 2016–2019 of the Belgian Federal Government and the Regions. In this note it is stressed that enforcement should be more efficient and effective and that police, customs, the judiciary, the federal and regional service should cooperate.<sup>50</sup>

In the Belgian progress report dated 2 February 2018 with respect to the EU Action Plan on Wildlife Trafficking, several actions aiming at better enforcement of the wildlife trafficking rules and increasing the capacity of the enforcement chain were mentioned, such as:

- Negotiations between the CITES management authority and the regional authorities “to resolve legislative issues regarding the Belgian competence concerning CITES and to draft a cooperation agreement/MoU”;
- Investment in the national CITES inspection department of 6 new inspectors, adding on to the 2 existing inspectors;
- Organisation of several actions by the Federal Agency for the Safety of the Food Chain, customs and the CITES inspection at the Belgian airports; meetings to improve cooperation at the airports;
- Improving the implementation of the MoU between Belgian and Chinese customs through the designation of a single contact point, the exchange of information on seized endangered species and a visit of Belgian custom officers to China to explain the duties and powers of Belgian customs concerning CITES;
- Organisation of several trainings by the CITES management authority for its inspectors, for customs officers, for the judiciary, for local police officers, for the Federal Agency for the Safety of the Food Chain.

According to this progress report, CITES controls at the airports and ports by customs officers seemed to be carried out only monthly or two monthly. More frequent controls at the airports and ports would increase the chance of being caught.

The inspection, customs and police services often lack capacity and training in an already complex CITES legislation.

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the procedure described in article 16.4.31–16.4.35 of the Flemish “Decree of 5 April 1995 including General Provisions regarding Environmental Policy”, according to which the prosecutor has 180 days (extendable with 180 days once) to decide to prosecute a case or to refer it to the Flemish inspection service for imposing an administrative fine. If the prosecutor does not take a decision within 180 days, an administrative fine is no longer possible.

<sup>50</sup> *Kadernota Integrale Veiligheid 2016–2019*, available (in Dutch) at: [https://www.politie.be/5998/sites/5998/files/downloads/Kadernota\\_IV\\_NL\\_DEF.pdf](https://www.politie.be/5998/sites/5998/files/downloads/Kadernota_IV_NL_DEF.pdf) (consulted on 3 February 2020).

For example, the federal police in Brussels has an environmental unit, but it has been downsized in recent years with only a handful of staff members remaining. This unit has a crucial role supporting local police officers in combating environmental crime through advice, training, centralized information, representation at Interpol and Europol and strategic analysis. It played an important role in the investigation of the birds laundering case (section 4.1).

In view of the complexity of the CITES legislation, the priority the European Union and Belgium attach to better enforcement and the increasing number of cases (see below, section 4), the training and capacity of the inspection, customs and police services should be strengthened further. More research capacity and international cooperation would allow to tackle not only the couriers, but the principals and addressees in the countries of origin and destination and stop Belgium from being an easy transit point for CITES-species.

#### 2.4.2 Organisation of the Judiciary

##### a) *The Courts*

An important number of environmental cases are heard before the courts of first instance, because it has general and full jurisdiction. This means that it has power to rule on all matters that are not reserved for another court of law.

So the courts of first instance try most environmental cases, in criminal matters as well as in civil matters.

It is not mandatory to install specialised environmental chambers, as is the case in Belgium for juvenile cases or tax-related matters.

The large majority of environmental cases brought before the Court of First Instance concern penal cases.

Only a minority are civil cases and these mainly concern liability actions for environmental damage and interim injunction proceedings or environmental actions for cessation. Judges in civil cases are, even less than criminal law judges, rarely specialised or trained in environmental law.

In April 2014 a general reform of the Belgian judicial landscape was carried out.<sup>51</sup> The 27 judicial districts were merged into 12 larger districts. The local departments remained, so in practice no courts were abolished.

The judicial districts can (there is no obligation) appoint one local department of the court of first instance which shall exclusively handle all the

<sup>51</sup> Act of 1 December 2013 reforming the judicial districts and modifying the Judicial Code, Belgian State Gazette of 10 December 2013, entry into force on 1 April 2014 ("*Wet van 1 december 2013 tot hervorming van de gerechtelijke arrondissementen en tot wijziging van het Gerechtelijk Wetboek met het oog op een grotere mobiliteit van de leden van de rechterlijke orde*").

environmental and town planning cases for all the departments of the district, allowing judges and prosecutors in these departments to specialise.

However, only the Courts of First Instance of Antwerp (Antwerp department), West-Flanders (Kortrijk department), Liège (Huy department), Luxembourg (Arlon department) and Namur (Namur department) have formally installed a department specialised in and handling all the environmental cases of the district.

In Antwerp, there are 2 examining judges specialising in environmental crime.

The Court of East-Flanders, Ghent department, has 2 judges specialising in environmental law and handling all the cases for the Ghent and Oudenaarde departments, but this is an *ad hoc* – and not yet a formal – arrangement.

The Courts of Appeal of Antwerp and Ghent have chambers specialising *de facto* in criminal environmental and town planning law and a specialised Attorney-General.

It should be pointed out that the judges and prosecutors who work in the specialised departments are not allowed to devote themselves exclusively to environmental cases. They have to combine environmental matters with other types of cases.

Unfortunately, not all courts of first instance of Belgium have installed specialised departments. This is partly because there is no legal obligation to appoint a local department specialised in environmental cases – this can be due to the low number of CITES cases and could also reflect other priorities – despite the obvious benefits that the assignment of CITES cases to specialised sections of the courts (one in the Dutch speaking part of Belgium and one in the French speaking part) would have on the efficiency and better continuity in the interpretation and enforcement of CITES regulations.”

#### b) *The Prosecutor's Offices*

Since 2008 there has been a voluntary collaboration between two smaller prosecutor's offices, in the Province of West-Flanders, Kortrijk and Ieper. Kortrijk specialised in all the environmental and town planning cases for the two districts (while Ieper took up other specialisations). This enabled the prosecutors in Kortrijk to specialise in environmental cases. In 2010 and 2011 this example was followed by other prosecutor's offices.

Since the above described judicial reform of 2014, most of the Belgian public prosecutor's offices in Flanders started (or continued) collaborating in e.g. environmental matters. In Antwerp for example, there is a specialised section for “Bijzondere Leefmilieu Wetgeving”. Two and a half FTE prosecutors are working fulltime on environmental, town planning, food safety and pharma-crime

and handling all the cases for the district of Antwerp (departments of Antwerp, Turnhout, Mechelen).

The Federal Public Prosecutor's Office in Brussels is competent for the entire Belgian territory. It was created to tackle international crime more efficiently, e.g. human trafficking, terrorism, organised crime or money laundering. In view of the international character of wild life trafficking a federal CITES public prosecutor could be appointed for more important CITES cases in which there are links with terrorism and organised crime.

### 3 Standing of Environmental Non-Governmental Organisations in Wildlife Trafficking Cases

In the fight against wildlife trafficking in Belgium, civil parties have an important watchdog function. In a nutshell, according to the Belgian Criminal Procedure Code, the victim of an (environmental) crime can bring an action for damages before the criminal court. When victims become a party in criminal proceedings, they are called “civil party”. Natural or legal persons who claim to be the victim of a crime can file a complaint with the examining magistrate and even trigger a criminal investigation.<sup>52</sup> During the investigation, the civil party can demand access to the criminal file at various moments.<sup>53</sup> The civil party has the right to ask the examining magistrate to carry out additional investigation acts<sup>54</sup> or to suspend an investigation act.<sup>55</sup> The civil party is invited to the hearings of the investigation court (“*Raadkamer*”) and can appeal the decision of this court at the end of the investigation.<sup>56</sup> When the inquiry takes over 1 year, the civil party can report the matter to the accusation chamber of the court of appeal (“*Kamer van Inbeschuldigingstelling*”).<sup>57</sup> The civil party can ask to be heard by the examining magistrate during the investigation.<sup>58</sup> Once the case is referred to a criminal court, the civil party attends or is represented during the hearings, alongside the public prosecutor, the defence and the accused. The civil party may claim damages and remediation measures.

Among civil parties, ENGOS play a special role, given their level of expertise on wildlife trafficking practices and their motivation to halting them. As well

52 Article 63 of the Belgian Criminal Procedure Code.

53 Article 61ter of the Belgian Criminal Procedure Code.

54 Article 61quinquies of the Belgian Criminal Procedure Code.

55 Article 61quater of the Belgian Criminal Procedure Code.

56 Article 135 of the Belgian Criminal Procedure Code.

57 Article 136, §2 of the Belgian Criminal Procedure Code.

58 Article 63 of the Belgian Criminal Procedure Code.



known by the readers of this journal,<sup>59</sup> it is therefore pivotal that the standing rights of ENGOS are regulated in line with the provisions of the Aarhus Convention.<sup>60</sup>

In Belgium, the right of standing of ENGOS is assessed on a case-by-case basis. Until 2013, the Belgian Court of Cassation interpreted the concept of “interest” in a narrow way. The protection of the environment as such did not suffice as a personal “interest”, and actions brought by environmental groups were often declared inadmissible.<sup>61</sup>

Since a judgment of 11 June 2013, the Court of Cassation interprets the admissibility requirements in line with articles 2, §5 and 9, §2 and 3 of the Aarhus Convention.<sup>62</sup> Organisations who, according to their bylaws, devote themselves to environmental protection, are considered to show a sufficient interest

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- 59 In chronological order, *J. Wates*, The Aarhus Convention: a Driving Force for Environmental Democracy, *JEEPL* 2005 (2), pp. 2–11; *J. Jendroska*, Aarhus Convention and Community Law: the Interplay, *JEEPL* 2005 (2), pp. 12–21; *M. Dross*, Access to Justice in EU Member States, *JEEPL* 2005(2), pp. 22–30; *V. Molaschi*, Standing to Sue of Environmental Groups in Italy and in the United States of America, *JEEPL* 2006 (1), pp. 52–68; *C. Herman*, Lisbon and Access to Justice for Environmental NGOs: A Watershed?, *JEEPL* 2010 (4), pp. 391–410; *B.W. Wegener*, European Right of Action for Environmental NGOs, *JEEPL* 2011 (4), pp. 315–328; *J. Jendroska*, Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice, *JEEPL* 2012 (1), pp. 71–90; *Y. Epstein & J. Darpö*, The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law, *JEEPL* 2013 (3), pp. 250–261; *S. Benvenuti*, Access to Justice in Environmental Matters, *JEEPL* 2014 (2), pp. 163–182; *A. Epiney & B. Pirker*, The Case Law of the European Court of Justice on Access to Justice in the Aarhus Convention and Its Implications for Switzerland, *JEEPL* 2014 (4), pp. 348–366; *J. Darpö*, Article 9.2 of the Aarhus Convention and EU Law, *JEEPL* 2014 (4), pp. 367–391; *E. Fasoli*, The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System, *JEEPL* 2016 (1), pp. 64–81; *L. Squintani & E.J.H. Plambeck*, Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg, *JEEPL* 2016 (3–4), 294–324; *M. van Wolferen*, Case C-243/15 *Lesoochránárske zoskupenie vlk v Obvodný úrad Trenčín*, *JEEPL* 2017 (1) 136–151; *L. Krämer*, Access to Environmental Justice: the Double Standards of the ECJ, *JEEPL* 2017 (2) 159–185; *J. Darpö*, On the Bright Side (of the eu's Janus Face) The EU Commission's Notice on Access to Justice in Environmental Matters, *JEEPL* 2017 (3–4), 373–398 and *C. Sobotta*, New Cases on Article 9 of the Aarhus Convention, *JEEPL* 2018 (2) 241–258.
- 60 United Nations, 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (Aarhus, Denmark, 25 June 1998, UN Treaty Series 2161), 447.
- 61 This was the so-called “Eikendael-doctrine” of the Court of Cassation, Cass. 19 November 1982, *Arr. Cass.* 1982–83, 372.
- 62 Article 2, paragraph 5 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 (“Aarhus Convention”).

to launch an action against violations of environmental law (acts or omissions) by private persons or authorities.<sup>63</sup>

In a judgment of 21 January 2016, the Constitutional Court decided that associations who work for a collective interest such as the protection of the environment can be awarded a compensation for moral damages higher than a symbolic compensation of €1, in case that collective interest has been violated. To limit the compensation to a symbolic €1, as many judges did up till then, is discriminatory and harms the interests of environmental protection groups “*who play an important role safeguarding the constitutional right to protection of a healthy environment*”.<sup>64</sup>

To conclude, the current case law of the Court of Cassation and the Constitutional Court of Belgium, which is not binding for the lower courts but authoritative, now grants wide access to justice to ENGO’s promoting environmental protection and entitles them to full compensation in case of moral or material damages.

#### 4 Empirical Evidences on Enforcement Action against Wildlife Trafficking in Belgium

According to numbers obtained from the Board of Attorneys General (*College van Procureurs-generaal*) in the period of the EU Action Plan 2016–2019, in total 1.039 new files related to “Protected species of animals, plants and ivory (Convention of Washington 3 March 1973)” were opened by the 28 public prosecutor’s offices in Belgium, subdivided as it follows:<sup>65</sup>

- 128 new CITES-cases were opened in 2016,
- 329 new CITES-cases were opened in 2017,<sup>66</sup>

63 Court of Cassation (2e k.) AR P.12.1389.N, 11 June 2013 (“*P.P., P.S.L.V. / Gewestelijk Stedenbouwkundig Inspecteur, Milieusteunpunt Huldenberg*”), *Arr. Cass.* 2013, 6-7-8, 1496.

64 Constitutional Court nr. 7/2016, 21 January 2016 (preliminary ruling), *TMR* 2016/ 3, 327.

65 We obtained these numbers on 20 January 2020, based on statistical research performed by analysts working for the Board of Attorneys General on 11 January 2020. The numbers concern only criminal infringements of the CITES legislation by adults. When the prosecutor receives an official report (“procès-verbal”), a case is opened and it gets a code on the basis of the main indictment. Secondary indictments are not always registered in the database. This means the numbers may be an underestimation of the total amount of CITES-cases. Each case is counted as one, independent of the number of suspects, victims etc.

66 This sudden increase in 2017 was mainly due to a local phenomenon, i.e. the seizure of a large amount of dietary supplements at Brussels airport, containing an element from a protected cactus (*aloe ferox*).

- 247 new CITES-cases were opened in 2018, and
- 335 new CITES-cases were opened, in 2019.<sup>67</sup>

This overview shows that there was a global increase of CITES-cases of 162% in 2019 compared to 2016. Based on numbers of the total amount of new criminal cases started by the prosecutor's offices in 2016, 2017, 2018,<sup>68</sup> the CITES-cases constituted 0,05% of the total case load.

The state of the 1.039 CITES-cases opened between 2016 and 2019 on 11 January was as follows:

- 104 cases were still under investigation (10,01%),
- in 396 cases, the prosecutor sent the case to the federal or regional CITES-inspector for imposing an administrative fine (38,11%),<sup>69</sup>
- 53 cases were settled out of court by the prosecutor (5,10%),<sup>70</sup>
- in 74 cases, the suspects got a warning from the prosecutor (7,12%),<sup>71</sup>
- 365 cases have been dismissed (35,13%), of these 365 CITES-cases:
- 161 cases (44,11%) were dismissed because of a lack of evidence or because the suspects could not be identified,<sup>72</sup> the so-called “dismissal for technical reasons”,<sup>73</sup>
- 204 cases (55,89%) were dismissed for so-called “opportunistic reasons”. The most invoked reasons were that “criminal sanctioning would be disproportionate to the violation of the public order” (122 cases or 33,42%),<sup>74</sup> the lack

67 This increase in 2019 was noted in most of the prosecutor's offices, so not restricted to a local phenomenon.

68 Numbers for 2019 were not yet available at the timing of concluding our research.

69 Unfortunately, we could not obtain complete figures on the number of administrative fines that have subsequently been imposed. According to information obtained from the federal CITES inspection service, between 2016 and 2018, 287 files were referred to this service by the prosecutor's offices. This service imposed an administrative fine in 201 cases. The figures for 2019 were not available at the time of concluding our research on 26 February 2020. Between 2016 and 2019, the Flemish inspection service received 4 CITES-related official reports and imposed 10 administrative fines (probably because several perpetrators were involved). Nevertheless, on the basis of these figures, we can conclude that the majority of CITES-cases are referred to the federal CITES inspection service, who imposes the majority of administrative fines.

70 The so-called “minnelijke schikking”.

71 The so-called “praetoriaanse probatie”.

72 For example, when it's not clear who is the owner of the many packages which are seized at the airports.

73 In Belgium, the prosecutor must motivate a decision to dismiss a case (art. 28quater al.1 Criminal Code). The possible motives for dismissal have been determined and listed in annex 1 of the circular letter nr. COL16/2014 of the Board of Attorneys general “regarding the application of the Act of 12 March 1998”).

74 A dismissal depends of many factors, such as the criminal record of the suspect, the seriousness of the offences.

of investigation capacity (38 cases or 10,41%)<sup>75</sup> and “other priorities” (10 cases or 2,74%).

- In 22 cases the suspects were summoned to appear in court (2,12%),
- 11 cases have been referred to another prosecutor’s office (1,06%),
- In 2 cases a fine has been paid immediately (“onmiddellijke inning”) (0,19%),<sup>76</sup> and
- For 12 cases the state was unknown (1,15%).<sup>77</sup>

The data show that only in a minority of cases the suspects were summoned to appear in court. Unfortunately, the data we obtained do not reveal how many of these 22 cases led to convictions and which sentences were imposed.

Nevertheless, four recent and real criminal cases are discussed below as examples of criminal sanctioning in CITES cases: the birds laundering case (section 4.1), the Sierra Leone – Beijing dried sea horses smuggling case (section 4.2), the concealed ivory import case (section 4.3) and the import and selling of Greek tortoises case (section 4.4).

#### 4.1 *The Birds Laundering Case*

On 27 June 2014, the Criminal Court of First Instance of East Flanders, Ghent division, in Belgium pronounced judgment in an important case of illegal trade in protected and endangered birds. The case was the result of a long and extensive judicial inquiry, including international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and The Netherlands. Eggs and fledglings of wild birds, mainly birds of prey, were stolen in large quantities from the wild in remote nature parks in the south of France and Spain. The eggs and fledglings were smuggled to Belgium in cars with mobile incubators. In Belgium the eggs were hatched out. The fledglings were hand-reared and ringed.

The birds species included among others Egyptian Vulture (*Neophron percnopterus*), African Fish Eagle (*Haliaeetus vocifer*), Imperial Eagle (*Aquila heliaca*), Bald Eagle (*Haliaeetus leucocephalus*), Bonelli’s Eagle (*Aquila fasciata*), Golden Eagle (*Aquila chrysaetos*), Booted Eagle (*Hieraaetus pennatus*), several Falcon species such as Peregrine (*Falco peregrinus*), Merlin (*Falco*

75 The lack of investigation capacity can be invoked e.g. when a case has international elements and only a weak link to Belgium.

76 The so-called “onmiddellijke inning” means the payment of a fine immediately after an infringement has been established. After the payment of this fine the prosecutor can no longer prosecute, except when the prosecutor is of the opinion that the fine is not sufficient in view of the entire context of the case.

77 Often this concerns cases that have been merged with another case for which the system does not allow to trace the current state.

*columbarius*), Hobby (*Falco subbuteo*), Red-footed Falcon (*Falco vespertinus*), Lesser Kestrel (*Falco naumanni*), Black-winged Kite (*Elanus caeruleus*), Red Kite (*Milvus milvus*), Black Kite (*Milvus migrans*), Spoonbill (*Platalea leucorodia*), Great Bustard (*Otis tarda*), Great Grey Owl (*Strix laponica*), Snowy Owl (*Nyctea scandiaca*), and Short-eared Owl (*Asio flammeus*). These birds are red listed according to the EU CITES Regulation Annex A. Trade activities with respect to these birds are prohibited. There is an exception when one can prove that a specimen has been bred and born in captivity. These birds can obtain a CITES-passport, which makes them marketable.

Through forgery of rings and breeder's declarations, the defendants obtained CITES-certificates for "captive-born and bred species", which allowed them to commercialise the birds in spite of the general prohibition to trade EU CITES Regulation Annex A species.

The criminal court hearing the case found the four defendants guilty of 504 facts of forgery of breeder's declarations and CITES-certificates regarding birds (of prey) listed in Annex A of the EU CITES Regulation and 522 facts of use of the falsified documents.<sup>78</sup> The four defendants were also found guilty of participating in a criminal organisation with international branches in Spain, the United Kingdom, Austria, Germany, France and the Netherlands. The purpose of this criminal organisation was the withdrawal of protected bird species from their habitats, obtaining forged CITES certificates and finally, marketing the birds. Typical – and considered evidential – of the criminal organisation was a clear hierarchy and division of tasks, the use of (police) officials and the creation of an animal zoo to obtain credibility and access to the market. The defendants were also convicted of fraud regarding CITES export permits, the failure to keep a CITES register and the use of illegal traps and nets.

Moreover, the birds of prey commerce was extremely profitable, if we consider that, for example, Bonelli's Eagle (*Aquila fasciata*) were sold for €10.000, Bald Eagle (*Haliaeetus leucocephalus*) for €5.000, African Fish Eagle (*Haliaeetus vocifer*) for €6.000, and Booted Eagle (*Hieraaetus pennatus*) for €5.000, each. The leading defendant and his wife were convicted of the laundering of the profits through a contractors company.

In its sentence, the court underlined that international trade in endangered plant and animal species has approached a scale and lucrativeness comparable to international drugs and arms trafficking. The defendants took advantage of the lack of political priority and thus enforcement of the CITES regulations. In the decision, the court stressed the defendants had committed a direct and irreversible assault on biodiversity. For profit, the defendants had seriously

<sup>78</sup> Criminal Court of Ghent 27 June 2014, *TMR* 2014, 330–367.

undermined national and international efforts to preserve and protect most vulnerable bird species.

In light of the above, the court issues imprisonment and penalties. The leading man was sentenced to 4 years imprisonment (1 year suspended) and a fine of €90.000. An amount of €515.800 of illegal gains was seized. The wife of this defendant was sentenced to a fine of €2.750 for participating in the crime of money laundering. A property and an amount of €207.655,35 of the couple were also seized. The number two, at the time of the crimes, a member of the Belgian federal police, was sentenced to 18 months imprisonment (suspended) and a fine of €30.000. The third defendant was sentenced to 1 year imprisonment (partly suspended) and a fine of €12.000. Finally, the fourth defendant was sentenced to 2 years imprisonment (1 year suspended) and a fine of €12.000.

Besides, all seized birds were confiscated and entrusted to the Belgian CITES management authority. The defendants were sentenced to pay the costs of forensic examination of the birds, and the costs of transport and maintenance of the birds. The ENGO Bird Protection Flanders was recognised as civil party to the proceedings, but its main claim in damages was considered to be purely moral. A mere symbolic €1 compensation for moral damages was awarded, while the ENGO was claiming €15.250 for moral damages.

Against the first instance court's judgment, both appeal and appeal in cassation were launched. In a judgment of 7 May 2015,<sup>79</sup> given *in absentia* of the main defendants, the Ghent Court of Appeal confirmed the judgment of the Court of First Instance, except in respect of the amount of the compensation due to the ENGO. The Court found that the ENGO Bird Protection Flanders was entitled to full compensation for moral damages.

The Court stated that those damages should be estimated by taking into account the objectives and activities of the ENGO according to its bylaws, the affected birds, the seriousness of the offences and the scale. The Court judged that the moral damages could be assessed *ex aequo et bono* to amount to €15.000. According to the Court, this amount is in proportion to the nature and the scale of the crimes and to the ecologic rights the civil party strives for.

In a judgment of 18 March 2016<sup>80</sup> rendered on opposition of the main defendants, the Court of Appeal of Ghent largely confirmed the judgment of 7 May 2015. The leading man was sentenced to 4 years imprisonment of which two years suspended instead of one year. An amount of €835.800 of illegal gains of

79 Ghent Court of Appeal 7 May 2015, not published.

80 Ghent Court of Appeal 18 March 2016, *TMR* 2016/5, 546.



the bird trade was confiscated. He had to bear the costs of the procedure, which amounted to over €50.000.

The compensation for moral damages of €15.250 (plus interests) for the ENGO was also confirmed, referring to the abovementioned judgment of 21 January 2016 of the Constitutional Court, according to which a mere symbolic compensation of €1 for moral damages of an ENGO would constitute discrimination of ENGOs.<sup>81</sup>

This case reached its final stance on 11 October 2016,<sup>82</sup> when the Court of Cassation turned down the arguments of the main defendants and confirmed the judgment of the Court of Appeal of 18 May 2016. There was one minor correction: on opposition, the amount of the confiscation for the second defendant was increased, without mentioning in the judgment that the sentence “was revised unanimously”, which is a mandatory statement when the Court of Appeal increases the sentence on appeal of the condemned persons.<sup>83</sup>

#### 4.2 *The Sierra Leone – Beijing Dried Sea Horses Smuggling Case*

On 20 April 2017 custom officers found dried sea horses during control of luggage of three Chinese citizens in transit from Africa (Sierra Leone) to Beijing. The suspects did not have any permit for the transport or import of sea horses. The three suspects carried more than 11 kilogrammes of dried sea horses (more than 2.000 species) in their luggage and only very little clothes. They also carried \$2.950 and \$3.400. They declared to be fishermen working for a Chinese company in Sierra Leone. They got the sea horses from African citizens. One of the suspects stated they fished the sea horses for 2,5 years and let them dry on the beach. Dried sea horses are eaten in China for backaches. In China there are sea horses, but not as big. They would not sell the sea horses but give them to family. Lined sea horses are on the IUCN Red List classified as a “vulnerable” specie, threatened by being caught as by catch in shrimp trawl fisheries, and traded dried as traditional medicine, curios, and live for aquarium<sup>84</sup>.

The three Chinese suspects were *inter alia* charged of the transit of specimen listed in Appendix II of the CITES Convention, without the required permits<sup>85</sup>, more specifically of 2.603 sea horses (*Hippocampus Erectus*). On 8

81 See under section 3.

82 Court of Cassation (2nd ch.) AR P16.0473.N, 11 October 2016 (H.O.J.V.T., E.V.V.T. / Vogelbescherming Vlaanderen vzw), *TMR* 2017, afl. 2, 150.

83 Article 211bis of the Belgian Criminal Procedure Code.

84 <https://www.iucnredlist.org/species/10066/20191442#threats>.

85 Article 7.2 of the EU CITES Regulation: “Derogations (...)” 2. *Transit*

(a) By way of derogation from Article 4, where a specimen is in transit through the Community, checks and presentation at the border customs office at the point of introduction of the prescribed permits, certificates and notifications shall not be required.



June 2017,<sup>86</sup> the Criminal Court of Brussels ruled that sea horses are listed in Appendix II of CITES and Annex B of the EU CITES Regulation and that the suspects did not have the required permits to transport the specimen to a third country, in this case China. The Court held there was sufficient proof of the suspects being deployed specifically to collect sea horses and to transport them to China. It was clear from their statements that they collected sea horses in Sierra Leone to import these illegally into China. The Court decided that in view of the quantities – and given the fact that the suspects carried almost no personal belongings – the specimens were not intended for personal consumption but for lucrative purposes. The Court also referred to the prices on the Chinese black market for sea horses.

In its sentence, the first instance court stressed: a) the gravity of the crimes, which illustrate a “fundamental lack of understanding of the importance of biodiversity protection”; b) only by complying with the conditions to trade in endangered species of wild animals and plants, this trade can be controlled in view of protecting the species diversity and general biodiversity; and c) the defendants did not pay attention to these concerns and were driven by the pure love of gain.

A serious imprisonment sentence was deemed necessary for the suspects to see the error of their ways. According to article 5 of the Belgian CITES Act, the offence of conveying goods in transit in violation of the CITES Convention or EU CITES Regulations with respect to species listed in Appendices I, II or III of the Convention must be punished with an imprisonment sentence of a minimum of 6 months and a maximum of 5 years and / or a fine of a minimum of €208 and a maximum of €400.000. The court must confiscate the specimens who have not been sent back or destroyed. The costs of forensic assessments, transport, maintenance, slaughter or destruction are at the expense of the condemned (article 6, §4 CITES Act).

As a result, each of the three suspects was sentenced to 15 months imprisonment (7,5 months suspended, because of their clean criminal records). The

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(b) In the case of species listed in the Annexes in accordance with Article 3 (1) and Article 3 (2) (a) and (b), the derogation referred to in (a) shall apply only where a valid export or re-export document provided for by the Convention, relating to the specimens that it accompanies and specifying the destination of the specimens, has been issued by the competent authorities of the exporting or re-exporting third country.

(c) If the document referred to in (b) has not been issued before export or re-export, the specimen must be seized and may, where applicable, be confiscated unless the document is submitted retrospectively in compliance with the conditions specified by the Commission. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

86 Criminal court of Brussels 8 June 2017, *TMR* 2017/5, 542.

sums of \$2,950 and \$3,400 were confiscated as illegal profits.<sup>87</sup> The dried sea horses were confiscated and destroyed at the expense of the condemned.

### 4.3 *The Concealed Ivory Import Case*

On 4 February 2016 customs inspectors controlled a shipment from the Democratic Republic of Congo (Kinshasa) to Belgium in a warehouse in Machelen (Flemish Region). The shipment contained several wooden statues that weighed more than usual. The wooden statues showed carvings. The inspectors opened the statues and found 56 pieces of worked ivory, weighing 8,307 kilogrammes. There was no CITES-permit for the items. These were declared as being “modern art work”. The wooden statues and the ivory were seized. On 29 March 2016, C.G., an antique dealer of Malian nationality, came to the warehouse to claim the shipment. The customs inspectors interrogated him. The airway bill mentioned his name and an address “Hotel Galaxy 0000 Brussels Belgium”. C.G. stated the wooden statues had been sent by a friend and he did not know these were filled with ivory pieces. The merchandise was destined to be sent and sold in New York. He voluntarily renounced the wares. He stated to be an advocate of animal protection.

C.G. was charged of introducing specimen of species listed in Annex A or B of the EU CITES Regulation into the European Community without completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination,<sup>88</sup> more in particular of 56 pieces of worked ivory from the African elephant (*Loxodonta Africana*) with a total weight of 8,307 kilogrammes, concealed in wooden statues shipped from the Democratic Republic of Congo to Belgium. The African elephant is listed in CITES Appendix I and the EU CITES Regulation Annex A, except for the populations of Botswana, Namibia, South Africa and Zimbabwe that are listed in CITES Appendix II and EU CITES Regulation Annex B<sup>89</sup>.

On 3 November 2016 the Criminal Court of Brussels condemned C. G. *in absentia* to an imprisonment sentence of 15 months. The court issued a warrant for his immediate arrest. The 56 pieces of ivory were confiscated and ordered to be destroyed at the expense of the defendant. Moreover, on 22 December 2016, the Court ruled on opposition of C.G. The court decided that it was clear from the documents accompanying the shipment of the wooden statues concealing the ivory objects, that the defendant was the owner of the shipment and that he got the export permit from the Congolese authorities. The court

<sup>87</sup> Article 42, 3° and 43bis Belgian Criminal Code.

<sup>88</sup> Article 4 of the CITES Regulation.

<sup>89</sup> The status of species in relation to international trade can be found at: <https://www.speciesplus.net> or the CITES website: [checklist.cites.org](http://checklist.cites.org).

dismissed the argument that he didn't know about the ivory because he was the only addressee of the shipment and the one who came to claim the shipment. Other pieces presented by the defendant were dismissed as being "implausible". The court stated there was no import permit issued by the Member State of destination. Considering the way of shipping, hidden in wooden statues, the import of the protected specimen of species was meant to remain secret.

For determining the punishment, the court stressed: a) the gravity of the crime; b) the lack of responsibility of the condemned, who as antique dealer, should be aware of the formalities for import and export of protected specimen under the CITES Convention; c) that in order to protect biodiversity, trade in protected animal and plant species must be controlled; and d) that the offence sustains other types of crime such as illegal poaching, which seriously threaten the survival of the population of wild animals threatened by extinction, such as the African elephant.

The court sentenced C.G. to 15 months imprisonment, "*to warn the condemned that the crimes will not pass*". Because he had a clean criminal record, half of the imprisonment sentence was suspended. Moreover, the 56 pieces of ivory were confiscated and destroyed at the expense of the defendant. No fine was imposed, because according to the court, the confiscation of the ivory constituted sufficient financial punishment.

#### 4.4 *The Import and Selling of Greek Tortoises Case*

On 7 September 2016 the local police in Kortrijk was alerted of sounds coming from a garage box rented by the defendant, a Moroccan citizen. When the police arrived at the garage (a bit earlier than the appointment), the defendant was loading the turtles into his car. The police found the garage box was filled with more turtles. There was no natural light, ventilation or water in the garage. There was a smell of putrefaction and a turtle in an advanced state of decomposition. The turtles were Greek tortoises (*Testudo graeca*).<sup>90</sup> The Greek tortoise lives in the wild in Morocco and is listed in Appendix II of the CITES Convention and Annex A of the EU CITES Regulation. The defendant stated he found the tortoises in the wild in Morocco. The tortoises that were still alive were seized and transferred to a shelter for reptiles, "SOS Reptile". The examination by an expert of the University of Ghent showed most animals were skinny, one third of the tortoises showed signs of dehydration, part of them had ticks, and many roundworms were found in the excrements. By the court hearing in September 2017, the NGO SOS Reptile reported all animals had died. According to the expert, the animals had died by a massive roundworm infection.

<sup>90</sup> One of five species of Mediterranean tortoises, a long-lived animal, achieving a lifespan of upwards of 125 years.

The defendant stated he bought the turtles in Morocco from children who caught these in the wild. He brought the turtles to Belgium by car in cardboard boxes. He was going to sell the animals via Internet. The investigation showed the defendant had been selling turtles via several Internet sites, using several aliases and telephone numbers.

The defendant confronted with several charges, among which:

- Breach of article 4.1<sup>91</sup> of the EU CITES Regulation: introduction of 334 Greek tortoises listed in Annex A into the Community without the prior presentation at the border customs office of an import permit issued by a management authority of the Member State of destination;
- Breach of Article 8.1 and 8.3 of the EU CITES Regulation<sup>92</sup>: the keeping and transporting for sale in Belgium of 334 Greek tortoises, which is prohibited, unless an exemption has been granted by issuance of a certificate by a management authority of the Member State in which the specimens are located, which was not the case; and
- Breach of Article 9.5 of the EU CITES Regulation<sup>93</sup>: transporting 334 Greek tortoises by car from Morocco to Belgium without paying any attention to the comfort of the animals or their basic needs such as food and water.

The Court<sup>94</sup> declared the defendant guilty of the abovementioned offences on the basis of the findings of the police, the statements of the defendant and the pictures in the criminal file. The defendant asked to order him to do community service. This was rejected by the court because of the gravity of the offences and because this punishment would not be dissuasive enough.

The defendant was condemned to 9 months imprisonment, in view of, most notably, the gravity of the facts, the numbers (334) of imported Greek tortoises, which are listed in Appendix II of the CITES Convention and Annex A of the EU CITES Regulation, the lack of care by the defendant about nature conservation or animal welfare, the defendant's drive by the love of gain leading the defendant to put his own financial interests above the interest of society to protect nature and biodiversity, and the criminal record of the defendant, who had already been condemned by the same court in 2010 to 18 months imprisonment (12 months suspended and a fine of €1.000) for drugs offences. Because of this conviction, according to the Belgian Criminal Code, the defendant was no longer entitled to suspension of the sentence. The court also imposed a fine (optional in the CITES Act) because of the profit objective and to dissuade the defendant: €600. The Mercedes car of the defendant was also confiscated

91 Focusing on introduction into the Community of specimens.

92 Focusing on provisions relating to the control of commercial activities.

93 Focusing on the movement of live species.

94 Court of First Instance Kortrijk 16 October 2017.

because according to the court there was proof the defendant had used the car to commit the offences.<sup>95</sup>

The Belgian State asked for compensation for the costs of transport, maintenance and examination of the seized tortoises. The claim was based on Belgian tort law<sup>96</sup> and on art. 6, §4 of the Belgian CITES Act, according to which the condemned must pay for the costs of assessments, transport, slaughter, destruction or maintenance of the species incurred until the date of the judgment. The court ordered the defendant to pay these costs for an amount of €14,657,80 and the costs of the lawyer of the Belgian state (€1,320).

The Belgian State also asked for a compensation of €1 for moral damage because of the assault on biodiversity. The Belgian State referred to the above-mentioned case law of the Constitutional Court (section 3), which recognised the right to moral compensation for ENGO's. However, the court turned this down because the state cannot be compared to an ENGO. According to the court, the state has no proper moral interest but acts for the public interest.

The ENGO SOS Reptile asked for compensation of the costs for the shelter and maintenance of 334 Greek tortoises during the criminal procedure, the costs of transport and of staff. The court granted a compensation of €85,624,48 and €3,600 for the costs of the lawyer. The ENGO SOS Reptile was granted €1 moral compensation, taking into account the objectives of the ENGO, that is the shelter of neglected or seized reptiles. The court decided the offences had violated the values the ENGO strives to protect.

In appeal, the Ghent Court of Appeal confirmed the punishment,<sup>97</sup> but gave the Mercedes back to the condemned because there was no proof, according to the court, that this car had been used to commit the offences, which is a requirement for confiscation in the Belgian Criminal Procedure Code. Besides, the claim of ENGO SOS Reptile was declared inadmissible because the ENGO offered shelter and maintenance for the animals pursuant to a contract with the Belgian State, for which invoices were sent. This does not constitute personal damage, according to the court.

## 5 Preliminary Conclusion and Recommendations

This contribution provides empirical insights in the functioning of the Belgian system for enforcement of wildlife trafficking regulations. In the period of the EU Action Plan on Wildlife Trafficking 2016–2019, the number of CITES-cases

95 Article 42,1° and 43 Belgian Criminal Code.

96 Article 1382 Belgian Civil Code.

97 Ghent Court of Appeal 27 June 2018.

opened by the prosecutor's offices increased by 162%. More than one third of the cases are redirected towards administrative sanctioning. More than one third of the cases get dismissed for technical or opportunist reasons. 12% of the cases are settled out of court by the prosecutor. 10% of the cases are still under investigation. A minority of cases (2,12%) go to criminal court.

The reviewed judgments in wildlife trafficking cases are examples of criminal sanctioning of this type of crime in Belgium. It shows that a combination of imprisonment and financial penalties are applied, in accordance with several key factors, such as past conduct of the defendants or their disregard for nature conservation. It also shows that ENGOs play a crucial role, that compensation for moral and material damages is possible under Belgian law and that it goes beyond mere symbolic amounts. It would be interesting to see how wildlife trafficking enforcement is tackled in other Member States.

More generally, the discussed cases show that wildlife crime is hot and organised, and that Belgium is both a final destination market for live birds and reptiles and a transit point for trafficking of for example ivory and sea horses to other continents, such as Asia. The bird laundering case is an example of wildlife trafficking within the European Union.

Of course, the finding that the four cases discussed in this manuscript can be considered cases of effective criminal sanctioning, does not mean that there is no room for improving the Belgian enforcement regime. These cases are just a sample of the low number of CITES-cases that are being successfully prosecuted. To meet the targets of the EU Action Plan against Wildlife Trafficking, the fight against wildlife trafficking should be stepped up. As indicated in section 2, in Belgium, the federal state and the three regions should better coordinate their CITES policy and legislation. In view of the increase of CITES-cases and the high portion of dismissals, the training and capacity of the inspection, customs, police services and prosecutors should be strengthened further. More frequent controls at the airports and ports would increase the chance of being caught. The environmental unit of the federal police should be reinforced. Moreover, a federal CITES public prosecutor could be appointed for serious CITES cases in which there are links with terrorism and organised crime. More research capacity and international cooperation would allow to tackle not only the couriers, but the principals and addressees in the countries of origin and destination and stop Belgium from being an easy transit point for CITES-species.

Finally, the assignment of CITES cases to specialised sections of the courts would contribute to more efficiency and better continuity in the interpretation and enforcement of CITES regulations.

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